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January 1, 2018

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2017 Report of the Ombudsman for Property Rights

The Office of the Ombudsman for Property Rights, created in 2006 by House Bill 1944 and located in the Office of the Public Counsel, is tasked with assisting “citizens by providing guidance, which shall not constitute legal advice, to individuals seeking information regarding the condemnation process and its procedures” (Mo. Rev. Stat § 523.277). The Ombudsman is required by § 523.277 to document the use of eminent domain within the state and any issues associated with its use, and shall submit a report to the General Assembly annually on January 1.

Missouri property owners contacted the Ombudsman in 2017 with a wide variety of eminent domain questions. The guidance provided by the Ombudsman included, but was not limited to, the following issues:

- the procedural timeframe involved in the condemnation of property;
- the steps a municipality must take to condemn property;
- the valuation of property subject to condemnation;
- the heritage value of property taken by eminent domain;
- the selection of commissioners in a condemnation proceeding;
- how to make a counter-offer to a municipality seeking to acquire property;
- the authority of a utility company holding an easement in exercise of such to remove/trim a landowner's trees;
- the authority for a permanent construction easement for a private developer.

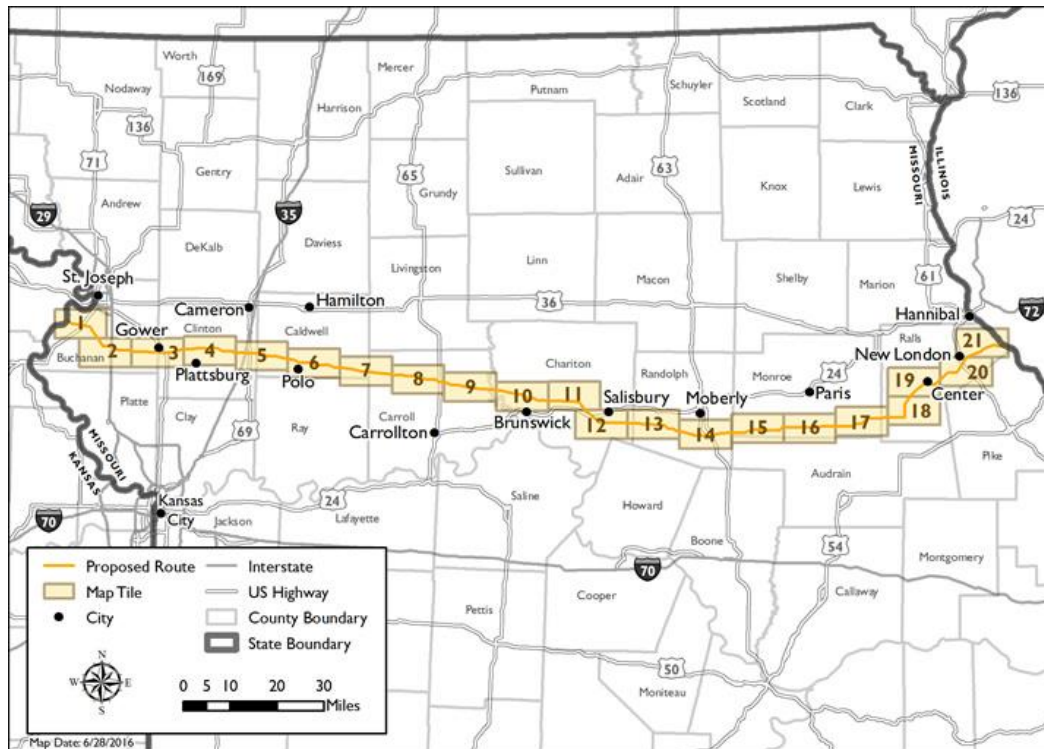
The below data includes summaries of specific 2017 projects involving eminent domain and summaries of relevant Missouri and Federal case law regarding eminent domain.

A. Status of Missouri Projects Involving Eminent Domain in 2017.

1. Grain Belt Express

The Grain Belt Express Clean Line is a \$2.35 billion project consisting of an approximately 780-mile overhead, direct current transmission line that would deliver wind energy from western Kansas to various utilities in Missouri, Illinois, Indiana, and other states. The project would deliver 500 megawatts into Missouri and 3,500 megawatts to states further east. Approximately 206 miles of high voltage, direct current transmission line would cross northern Missouri from Kansas to Illinois. The affected Missouri counties would include Buchanan, Clinton, Caldwell, Carroll, Chariton, Randolph, Monroe, and Ralls counties.

Grain Belt's proposed route is as follows:



In 2015, the Missouri Public Service Commission (“PSC”) denied the request for a certificate of convenience and necessity authorizing Grain Belt Express Clean Line, LLC (“Grain Belt”) to construct, own, operate, control, manage and maintain the proposed electric transmission line. PSC concluded Grain Belt failed to satisfy its burden to demonstrate that the project is necessary or convenient for the public service. (PSC Case No. EA-2014-0207).

In 2016, Grain Belt filed an updated application with PSC requesting approval of the project (PSC Case No. EA-2016-0358). In this new filing, Grain Belt offered updated information, claiming that they had entered into a transmission service agreement with the Missouri Joint Municipal Electric Utility Commission, which had also agreed to purchase 225 megawatts of capacity for the project.

Case No. EA-2016-0358 was decided by PSC on August 16, 2017. PSC noted that Grain Belt obtained county assents for this project from Buchanan, Caldwell, Carroll, Chariton, Clinton, Monroe, Ralls, and Randolph counties (which consist of all but one of the counties needed). However, five of those counties tried to withdraw their assent. Caldwell did not give assent at any

point. Using *In re Transmission Co. v. PSC* (see below) as its authority, PSC denied Grain Belt its certificate of convenience and necessity because Grain Belt failed to establish that it had obtained county assents from each county affected by the project before approval.¹ This matter is currently on appeal, case numbers ED 105932.²

2. Mark Twain Transmission Project

In May 2015, the Ameren Transmission Company of Illinois (“ATXI”) filed an application with PSC seeking authority to build and operate an electric transmission line in northeast Missouri, which was called the Mark Twain Transmission Project (PSC Case No. EA-2015-0146). The 97-mile transmission line was proposed to run from Palmyra to Kirksville, through Marion, Shelby, Knox and Adair Counties. It would then turn north into Iowa through Schuyler County. The project would have required a 150-foot easement across private land for approximately 95 miles and a 100 foot easement for two miles.

In April 2016, PSC authorized ATXI to build its proposed transmission line, conditioned upon all five county commissions giving assent. Those county commissions either denied or tabled the matter. Therefore, Ameren filed for judicial review in an attempt to compel the counties to give assent.

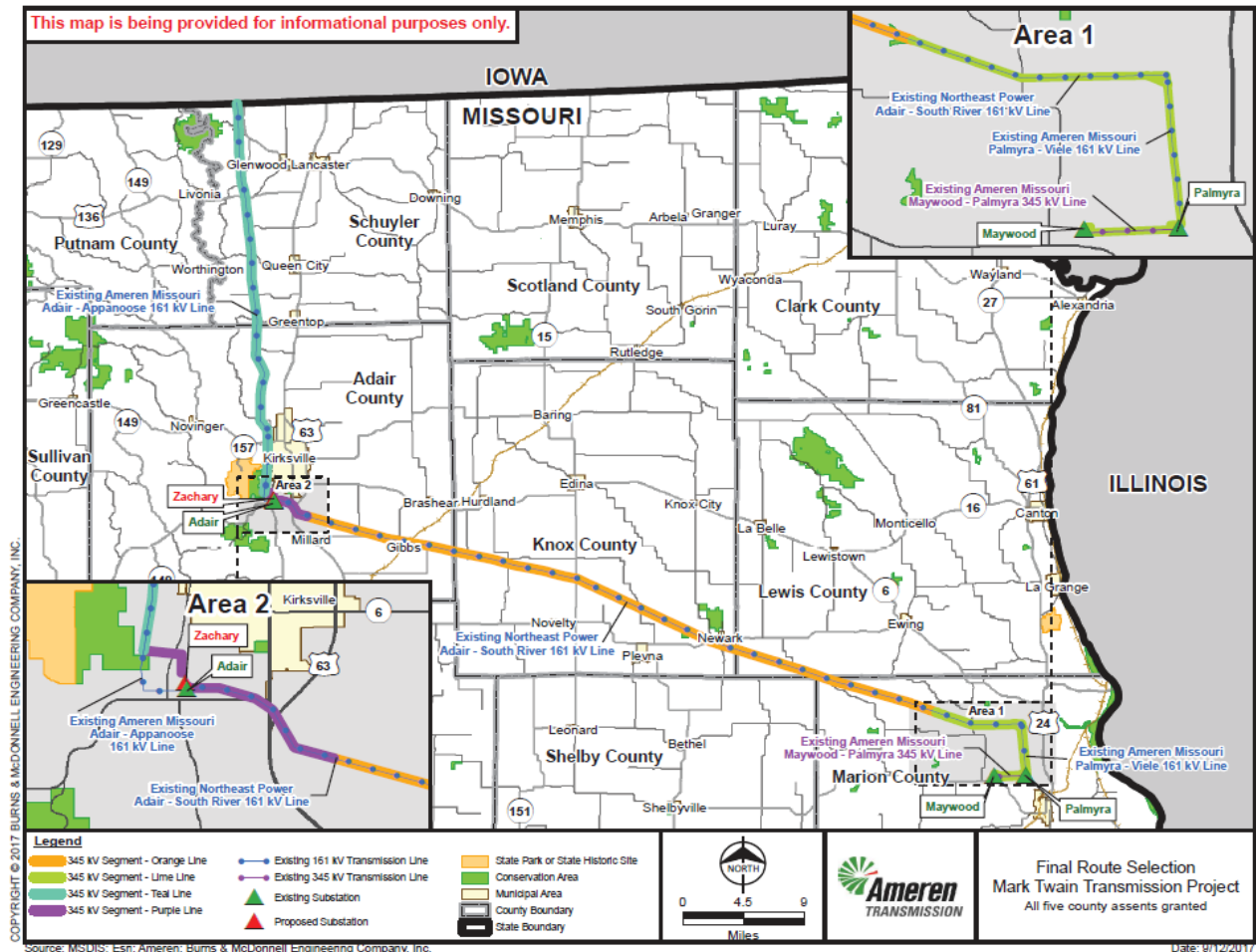
Meanwhile, the PSC Order was appealed to the Court of Appeals, Western District. The Western District vacated the PSC’s order because it exceeded the PSC’s statutory authority.³ Section 229.100 requires companies to obtain county approval prior to erecting power lines. If an item required by rule is unavailable at the time of the application being filed, they “shall” be furnished prior to the granting of authority. Accordingly, it exceeded the PSC’s statutory authority to enter an order allowing Ameren to build subject to the condition that assent being obtained at a later date. As a result of this ruling, the 2016 circuit court judicial review actions referenced above were voluntarily dismissed by Ameren.

¹ This left the question of whether a county may withdraw its assent unanswered.

² Grain Belt applied for transfer to the Missouri Supreme Court prior to a disposition at the Court of Appeals, but that application was denied (Case No. SC 96755).

³ *In re Ameren Transmission Co. v. PSC of Missouri*, 523 S.W.3d 21 (Mo. App. W.D. March 28, 2017).

During 2017, ATXI proposed a new route. The new route would pass through Schuyler, Adair, Knox, Lewis, and Marion Counties. Ameren filed for a certificate of need or necessity on September 15, 2017. (Case No. EA-2017-0345). In its Application, ATXI alleges that it has obtained assent from all affected counties. The hearing for this matter is currently scheduled to occur in February 2018.



B. Other Eminent Domain Cases in Missouri Appellate Courts in 2017.

1. *Hull v. Pleasant Hill School District*, 526 S.W.3d 278 (Mo. App. W.D. June 6, 2017)

Mr. Jim and Ms. Nancy Hull (“the Hulls”) purchased a golf course in 2005 from a trust set up by Mr. Hull’s parents. Beginning 2007, Pleasant Hill School District (“the District”) cleared land that was adjacent to both the school and the golf course to create practice fields on that land. As a result, water was redirected into the golf course, causing the golf course to flood.

The first issue resolved was whether the golf course belonged to the Hulls on the date of the taking. While the Hulls purchased the golf course in 2005, they did not record the deed until 2009, two years after the golf course began to flood. The Western District ruled that the Hulls did own the property for the purposes of an inverse condemnation⁴ proceeding for the following reasons: 1) the recording of a deed does not create title, but rather communicates notice of title; therefore, title was transferred on the date of the Hulls’ purchase; 2) possession conveys notice of some ownership interest; 3) the condemnation occurs on the date that the damage was capable of ascertainment (in this case the Hulls were not able to ascertain the magnitude of the flooding until 2013).

The second issue was whether the court should have entered a jury instruction for partial taking or whether the court properly entered the jury instruction for the total taking. An instruction for a partial taking would require the jury to calculate a loss in market value whereas a total taking instruction would award the Hulls for the entire value of the property. The Western District affirmed the trial court’s decision to only enter a total taking instruction. The District argued that flooding only occurred from time to time, affected only part of the golf course, and only resulted in occasional closings. However, the Western District affirmed the trial court, finding that sufficient

⁴ An inverse condemnation proceeding is one where the government entity did not initiate a condemnation proceeding, but rather the property owner had to initiate their own lawsuit to seek compensation for a condemnation.

evidence existed to satisfy the test total takings test, which evaluates whether the flooding made the land useless for running a golf-course business.

2. *Land Clearance for Redevelopment Authority of St. Louis v. Reverse Mortgage Solutions*, ED 105017 (Mo. App. E.D. August 29, 2017)

Here, Land Clearance for Redevelopment Authority of St. Louis (“LCRA”) filed a condemnation case against several parcels of land. One such parcel had several lien holders, including Reverse Mortgage Solutions (“RMS”), a reverse mortgage company. The panel of commissioners assessed the value of the land and awarded \$80,000, plus \$20,000 for homestead value. The party who inhabited the house on the land collected the \$20,000 homestead value. The reverse mortgage company received \$13,000. The trial court awarded the remainder to “fee simple owners [four named] are each entitled to 25% of the proceeds on any final distribution after a trial of exceptions.” It was this quoted language that became a point of contention.

Section 523.053.2, RSMO, contemplates that the trial court must designate percentages of the total award to each interested party. The award must also contemplate any additional compensation or reduction of the award. The Eastern District remanded because the language used by the trial court did not account for potential reductions in the commissioners’ award.

3. *City of Scotland v. Mo. Pub. Entity Risk Management Fund*, WD80518 (Mo. App. W.D. October 17, 2017)

This case determines whether a regulatory taking constitutes “eminent domain” or “inverse condemnation” in a contractual dispute. Here, Missouri Public Entity Risk Management Fund (“MOPERM”) and the City of Scotland had an agreement for liability coverage. That agreement was governed by a memorandum which stated that coverage did not include claims for “loss or damage arising out of or in connection with the principles of eminent domain, or proceedings to condemn property or inverse condemnation...”

Here, Scotland was sued after its city commissioners denied a citizen a permit to construct and operate a concentrated animal feeding operation. The citizen sought judicial review, alleging that the denial constituted a regulatory

taking of his property. MOPERM refused to provide the Scotland commissioners coverage for the defense of that lawsuit.

The Western District agreed with MOPERM that a regulatory taking is eminent domain and/or a condemnation. A regulatory taking is “when government regulation does not result in a physical invasion of property or the denial of all economically viable use but, instead, goes too far in restricting the exercise of property rights.” Therefore, MOPERM had no duty to defend the lawsuit against Scotland.

C. Eminent Domain Case at the United States Supreme Court

1. *Murr v. Wisconsin*, 137 S.Ct. 1933 (June 23, 2017)

This is another regulatory takings case. The Murrs purchased two lots, E and F, from their parents in separate transactions in 1994 and 1995. Both lots were over one acre in size, but both also had less than acre of land suitable for development. The Murrs tried to sell Lot E, but the sale was denied by a county Board of Adjustment because of a regulation that prevents the sale of adjacent lots under common ownership unless both lots have over an acre of land suitable for development.

The majority, Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan found this not to be a regulatory taking. Their inquiry was to determine whether the owners had reasonable expectations about property ownership that would lead a landowner to anticipate that their holding would be treated as one parcel or as separate tracts. Here, there was such a reasonable expectation. They gave three reasons: 1) the property’s treatment under state and local law constitute a valid merger of land, which gave an expectation that the lots will be treated as one parcel of land (such regulations preceded the Murrs’ purchase of the lots), 2) their terrain and shape make it reasonable to expect that their range of potential uses might be limited, and 3) the lots add value to each other, which mitigates the loss to the Murrs.

D. Eminent Domain Cases in the Eighth Circuit Court of Appeals in 2017

1. *Barfield v. Sho-Me Power Elec. Coop*, 852 F.3d 795 (8th Cir. March 29, 2017)

This case addresses the scope of easements. Sho-Me Power Cooperative held easements to construct and operate an electric transmission line over thousands of parcels of land. In 1997, it decided to install fiber-optic cables along the same easement lines. They used the fiber-optic lines for internal communications and sold excess capacity to Sho-Me Technologies, LLC to operate a telecommunications business.

In a class action lawsuit, owners of the land subject to the easements sued for trespass because the scope of the easements were exceeded. “An easement is not the complete ownership of land....” Rather, it is the “right to one or more particular uses....” By selling capacity to Sho-Me Technologies, the scope of the easement, that is electronic transmission, was exceeded. Commercial telecommunications are unrelated to supplying electricity. Sho-Me argued that the land owners do not have the right to insist that the public use remain precisely the same. However, the 8th Circuit stated that, while the degree of usage may remain the same, the company cannot exceed the scope of and purpose of electric transmission. Therefore, the usage for telecommunications purposes is a trespass.

The remedy for such a trespass is the landowner’s choice. The landowner may elect to enjoin the installation by ejectment or the landowner may invoke an inverse condemnation proceeding. However, the landowners may not sue for unjust enrichment.⁵

E. Notable Regional Cases

⁵ The District Court originally allowed for unjust enrichment, which was valued at \$79 million.

1. *Illinois Landowners Alliance, NFP v. Illinois Commerce Commission*, Docket Nos. 121302, 121304, 121305, & 121308 (Ill. September 21, 2017)

Similar to the Grain Belt and Mark Twain projects referenced above, Rock Island, LLC, wished to construct and manage an electric transmission line. This line was to run from South Dakota, Nebraska, and Minnesota into Illinois. The company was not yet operating, but planned to sell to eligible customers in Illinois. They sought a certificate of public convenience and necessity from the Illinois Commerce Commission, and asked for a permit under Illinois utilities law to authorize construction of the transmission line. In denying that certificate, the Illinois Commerce Commission found that Rock Island did not qualify as a public utility because it did not presently own, control, operate, or manage a utility within Illinois. This is significant to eminent domain because, as the Illinois Supreme Court stated, it makes the “initial phase of their operations more difficult and cumbersome.” “For example, they [the transmission company] will not have the benefit of eminent domain to obtain the property on which their facilities will be located.”

F. 2017 Eminent Domain/Condemnation Data From State Courts Administrator

Condemnation Initiated from 01/01/2017 to 12/11/2017					
County	Circuit Court Eminent Domain/Condemn on Structures	Circuit Court Domain/Condemn non-structures	Associate Circuit Court Domain/Condemn on Structures	Associate Circuit Court Domain/Condemn non-structures	Grand Total
Audrain County		1			1
Benton County		1			1
Buchanan County		2			2

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County	Circuit Court Eminent Domain/Condemn on Structures	Circuit Court Domain/Condemn non-structures	Associate Circuit Court Domain/Condemn on Structures	Associate Circuit Court Domain/Condemn non-structures	Grand Total
Carter County	1				1
City of St Louis		1	1		2
Clay County		1			1
Cole County		1			1
Franklin County		1			1
Greene County		1			1
Holt County	1				1
Jackson County	1	6			7
Jasper County		1			1
Jefferson County		3		1	4
Ozark County	1				1
Phelps County		1			1
Pike County	2	1			3
Platte County		5			5
Scott County	1				1
St. Charles County	7	19			26
St. Louis County	1	6			7
Taney County		1			1
Webster County		1			1
Grand Total	15	53	1	1	70

Condemnation Disposed from 01/01/2017 to 12/11/2017

County & Disposition	Circuit Court Eminent Domain/Condemn Structure	Circuit Court Eminent Domain/Condemn Non-structure	Associate Circuit Court Eminent Domain/Condemn Structure	Grand Total	
Boone County		1		1	
Dismiss by Ct w/o Prejudice		1		1	
Buchanan County		3		3	
Dismissed by Parties		1		1	
Other Final Disposition		2		2	
Cass County	2			2	
Dismiss by Ct w/o Prejudice	1			1	
Dismissed by Parties	1			1	
Christian County		1		1	
Dismiss by Ct w/ Prejudice		1		1	
City of St Louis		1	1	2	
Dismiss by Ct w/o Prejudice		1		1	
Tried by Court-Civil			1	1	
Clay County		6		6	
Dismissed by Parties		4		4	
Other Final Disposition		2		2	
Franklin County		2		2	
Dismiss by Ct w/ Prejudice		1		1	
Dismissed by Parties		1		1	
Holt County	1			1	
Tried by Court-Civil	1			1	
Jackson County	1	7		8	
Consent Judgment		1		1	
Dismissed by Parties		1		1	
Other Final Disposition		3		3	
Removed to Fed Court	1			1	
Tried by Court-Civil		2		2	
Jefferson County		3		3	
Consent Judgment		1		1	
Dismiss by Ct w/o Prejudice		1		1	

Tried by Court-Civil		1		1	
Ozark County	1			1	
Tried by Court-Civil	1			1	
Pettis County		1		1	
Dismissed by Parties		1		1	
Phelps County	1			1	
Tried by Court-Civil	1			1	
Pike County	1	1		2	
Other Final Disposition	1	1		2	
Scott County	1			1	
Tried by Court-Civil	1			1	
St. Charles County	5	13		18	
Dismiss by Ct w/o Prejudice	2			2	
Dismissed by Parties	2	1		3	
Other Final Disposition	1	11		12	
Tried by Court-Civil		1		1	
St. Louis County	1	6		7	
Dismissed by Parties	1	5		6	
Uncontested		1		1	
Taney County		4		4	
Dismiss by Ct w/o Prejudice		2		2	
Dismissed by Parties		1		1	
Tried by Court-Civil		1		1	
Webster County		4		4	
Dismiss by Ct w/o Prejudice		1		1	
Other Final Disposition		3		3	
Grand Total	14	53	1	68	

G. Department of Transportation Data

The Missouri Department of Transportation acquired 351 parcels of real property for state projects in Calendar Year 2017 to date.⁶ 343 were resolved by negotiation, 8 required a condemnation lawsuit. Property owner satisfaction rating, overall, for CY 2017 to date was a 4.80 out of 5.⁷

⁶ Data taken on December 19, 2017.

⁷ As compared to a 4.63 in 2016, 4.7 in 2015, 4.47 in 2014, 4.8 in 2013, 4.6 in 2012, and 4.8 in 2011.

H. Conclusion

The protection and preservation of private property rights are fundamental and vital objectives of law in our society. As James Madison stated:

It is sufficiently obvious, that persons and property are the two great subjects on which Governments are to act; and that the rights of persons, and the rights of property, are the objects, for the protection of which Government was instituted. These rights cannot well be separated. The personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right.⁸

Therefore taking of private property from individuals and businesses through eminent domain is an exercise of solemn authority. In observance of this duty, the State of Missouri established this office as a resource for the benefit its citizens and to provide guidance in the exercise of their most sacred rights. While most property owners subjected to eminent domain would benefit from legal representation, which they are free to avail themselves, for many property owners hiring an attorney to represent their interests in a condemnation proceeding is not within their budget or not worth the cost when the taking is minimal. For these underrepresented Missourians, the Ombudsman's guidance is most valuable.

For questions or concerns about this report, please contact Hampton Williams, Acting Public Counsel, at (573)751-4857.

⁸ James Madison, fourth President of the United States, "First Speech in the Virginia Convention of 1829" (Dec 2, 1829).
<http://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-02-02-02-1924>.

Respectfully Submitted,

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